



SMALL BUSINESS ADMINISTRATION

13 CFR Parts 124, 125, 126, and 127

RIN 3245-AH27

National Defense Authorization Act of 2020, Definition of Surviving Spouse for Service-Disabled Veteran-Owned Small Businesses and Change to 8(a) Business Development Contracting Thresholds

AGENCY: U.S. Small Business Administration.

ACTION: Direct final rule.

SUMMARY: This rule makes technical changes to regulations issued by the U.S. Small Business Administration (SBA) to conform those regulations to recent statutory changes. First, the rule incorporates a required change to SBA's ownership requirements for small business concerns owned and controlled by service-disabled veterans. The rule adopts changes to the treatment of certain surviving spouses made by the National Defense Authorization Act of 2020. In addition, the rule incorporates changes to the dollar thresholds for certain contracting actions authorized for the 8(a) Business Development (BD) program made by the National Defense Authorization Act of 2020. Finally, the rule adjusts the competitive threshold dollar levels authorized for SBA's contracting programs to changes made to the Federal Acquisition Regulation (FAR) due to inflation.

DATES: This rule is effective on [INSERT DATE 90 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER], without further action, unless significant adverse comment is received by [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]. If significant adverse comment is received, SBA will publish a timely withdrawal of the rule in the *Federal Register*.

ADDRESSES: You may submit comments, identified by RIN 3245-AH27, by any of the following methods:

- *Federal eRulemaking Portal*: <http://www.regulations.gov>. Follow the instructions for submitting comments.
- *For mail, paper, disk, or CD-ROM submissions*: Donna Fudge, U.S. Small Business Administration, Office of Policy, Planning and Liaison, 409 Third Street SW, 8th Floor, Washington, DC 20416.
- *Hand Delivery/Courier*: Donna Fudge, U.S. Small Business Administration, Office of Policy, Planning and Liaison, 409 Third Street SW, 8th Floor, Washington, DC 20416.

SBA will post all comments on www.regulations.gov. If you wish to submit confidential business information (CBI) as defined in the User Notice at www.regulations.gov, please submit the information to Donna Fudge, U.S. Small Business Administration, Office of Policy, Planning and Liaison, 409 Third Street, SW, 8th Floor, Washington, DC 20416, or send an email to donna.fudge@sba.gov. Highlight the information that you consider to be CBI and explain why you believe SBA should hold this information as confidential. SBA will review the information and make the final determination on whether it will publish the information.

FOR FURTHER INFORMATION CONTACT: Donna Fudge, Procurement Analyst, Office of Policy, Planning and Liaison, U.S. Small Business Administration, 409 Third Street, SW, Washington, DC 20416; donna.fudge@sba.gov.

SUPPLEMENTARY INFORMATION: On December 20, 2019, the National Defense Authorization Act for Fiscal Year 2020 (NDAA 2020), Public Law 116–92, 133 Stat. 1198, was signed into law. Section 876 of NDAA 2020 amended section 3 of the Small Business Act, 15 U.S.C. 632. This provision made changes to the treatment of surviving spouses with regard to the program’s ownership requirements. The changes require that SBA update its regulations to reflect two new time periods. Specifically, the statute creates a ten-year time period to remain eligible in the case of a surviving spouse of a veteran with a service-connected disability rated as 100 percent disabling or who dies as a result of a service-connected disability, and a three-year time period in the case of a surviving spouse of a veteran with a service-connected disability

rated as less than 100 percent disabling who does not die as a result of a service-connected disability. This rule updates 13 CFR 125.12 to reflect these changes. SBA is changing the language in § 125.12(i)(1)(ii) to match the new statutory language. SBA is adding the ten-year time frame in § 125.12(i)(2)(iii). SBA is adding the three-year time frame in § 125.12(i)(2)(iv).

In addition, section 823 of NDAA 2020 changed the threshold for which a justification and approval is needed for Department of Defense (DoD) covered procurements. Section 811 of the NDAA for Fiscal Year 2010, Public Law 111-84, 123 Stat. 2190, 2405, required the Federal Acquisition Regulations (FAR) to be amended to include a new requirement for a written justification of sole-source 8(a) awards over \$20 million. The FAR increased this threshold to \$22 million due to inflation on July 2, 2015. 80 FR 38293, 38296. While the section 811 requirement for a justification and approval applied to all civilian and defense agencies, section 823 of NDAA 2020 increased the threshold to \$100 million only for the DoD. As such, this rule amends SBA's regulations to increase the justification and approval requirement to \$100 million only with respect to DoD 8(a) contracts. In addition, DoD, the General Services Administration (GSA), and the National Aeronautics and Space Administration (NASA) are charged with amending the FAR to adjust statutory acquisition-related thresholds for inflation every five years. On October 2, 2020, DoD, GSA, and NASA published a final rule in the *Federal Register* amending the FAR to implement new inflationary adjustments. 85 FR 62485. As part of that final rule, the \$22 million justification and approval threshold authorized by section 811 of NDAA 2010 was increased to \$25 million. Thus, in addition to increasing the threshold to \$100 million for DoD-related 8(a) procurements, this rule also increases the justification and approval threshold from \$22 million to \$25 million for all other agencies. This rule amends § 124.502(c)(17) and § 124.506(b)(5) to adjust the justification and approval thresholds accordingly.

In addition to the justification and approval and 8(a) sole source thresholds identified above that were raised in response to the inflationary adjustments made to the FAR, that same

FAR rule also adjusted other SBA-related contacting dollar thresholds for inflation. 85 FR 62485. Section 864 of the National Defense Authorization Act of 2021, Pub. L. 116–283, subsequently amended the Small Business Act to set the 8(a), HUBZone, and WOSB sole source thresholds for manufacturing contracts to \$7,000,000. As such, this rule incorporates the FAR changes into SBA’s regulations except where section 864 retained a \$7 million sole source threshold amount for manufacturing contracts. Specifically, this rule adopts the inflationary adjustments made to the sole source thresholds in the FAR for the 8(a) BD Program (by amending § 124.506(a)(2)(ii) of SBA’s regulations), the Service-Disabled Veteran-Owned Small Business Concern Program (by amending § 125.23(b)(1) of SBA’s regulations), the Historically Underutilized Business Zone Program (by amending § 126.612(b)(1) and (2) of SBA’s regulations), and the Women-Owned Small Business Program (by amending § 127.503(c)(2) and § 127.503(d)(2) of SBA’s regulations). SBA is also updating a threshold for its Small Business Subcontracting Program, which is contained in § 125.3(c).

SBA is also making corrections to § 126.200(f) and § 126.700(b)(1). Currently both sections contain an incorrect reference to § 126.5. The correct cross reference should be to § 125.6, and this rule corrects the typographical errors.

Compliance with Executive Orders 12866, 13563, 12988, 13132, 13175, the Congressional Review Act (5 U.S.C. 801-808), the Paperwork Reduction Act (44 U.S.C. Ch. 35), the Regulatory Flexibility Act (5 U.S.C. 601-612), and the Administrative Procedure Act.

Executive Order 12866

The Office of Management and Budget (OMB) has determined that this direct final rule does not constitute a significant regulatory action under Executive Order 12866.

Executive Order 13563

Executive Order 13563 reaffirms the principles of Executive Order 12866 while calling for improvements in the nation's regulatory system to promote predictability, to reduce uncertainty, and to use the best, most innovative, and least burdensome tools for achieving

regulatory ends. The executive order directs agencies to consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public where these approaches are relevant, feasible, and consistent with regulatory objectives. Executive Order 13563 also requires that regulations be based on the open exchange of information and perspectives among state and local officials, affected stakeholders in the private sector, and the public as a whole. SBA has developed this rule in a manner consistent with these requirements. While developing this rule, SBA responded to specific inquiries from government officials and the public regarding the implementation of the statutory required changes.

Executive Order 12988

This action meets applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden. The action does not have retroactive or preemptive effect.

Executive Order 13132

A rule has implications for federalism under Executive Order 13132, Federalism, if it has a substantial direct effect on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. This direct final rule will not have substantial direct effects on the States, on the relationship between the National Government and the States, or the distribution of power and responsibilities among the various levels of government.

SBA has analyzed this direct final rule and has determined that it is consistent with the fundamental federalism principles and preemption requirements described in Executive Order 13132.

Executive Order 13175

This rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it would not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and

Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

Congressional Review Act, 5 U.S.C. 801-808

OMB's Office of Information and Regulatory Affairs has determined that this rule is not a major rule under subtitle E of the Small Business Regulatory Enforcement Fairness Act of 1996 (also known as the Congressional Review Act), 5 U.S.C. 804(2).

Paperwork Reduction Act, 44 U.S.C. Ch. 35

SBA has determined that this direct final rule does not impose additional reporting or recordkeeping requirements under the Paperwork Reduction Act, 44 U.S.C., chapter 35.

Regulatory Flexibility Act, 5 U.S.C. 601-612

The Regulatory Flexibility Act (RFA), 5 U.S.C. 601, requires administrative agencies to consider the effect of their actions on small entities, small non-profit enterprises, and small local governments. Pursuant to the RFA, when an agency issues a rulemaking, the agency must prepare a regulatory flexibility analysis, which describes the impact of the rule on small entities. However, section 605 of the RFA allows an agency to certify a rule, in lieu of preparing an analysis, if the rulemaking is not expected to have a significant economic impact on a substantial number of small entities. Within the meaning of RFA, SBA certifies that this direct final rule will not have a significant economic impact on a substantial number of small entities. It does not add any new requirements to SBA's regulations, but merely adjusts specified thresholds to conform to statutory changes and changes made by the FAR.

Administrative Procedure Act—Justification for Direct Final Rule

In general, SBA publishes a rule for public comment before issuing a final rule, in accordance with the Administrative Procedure Act. 5 U.S.C. 553. The Administrative Procedure Act provides an exception to this standard rulemaking process, however, where an agency finds good cause to adopt a rule without prior public participation. 5 U.S.C.

553(b)(3)(B). The good cause requirement is satisfied when prior public participation is impracticable, unnecessary, or contrary to the public interest.

SBA is publishing this rule as a direct final rule because public participation is unnecessary. SBA views this as a non-controversial administrative action because it merely implements a change required by the Small Business Act, as amended by section 876 of NDAA 2020. This rule will be effective on the date shown in the DATES section unless SBA receives significant adverse comment on or before the deadline for comments. Significant adverse comments are comments that provide strong justifications why the rule should not be adopted or for changing the rule. SBA does not expect to receive any significant adverse comments because the rule simply mirrors the statutory language contained in section 876 of NDAA 2020, with no extraneous interpretation or other expanded text. The remaining technical changes merely conform SBA regulations with the updated thresholds in the FAR.

If SBA receives significant adverse comment, SBA will publish a notice in the *Federal Register* withdrawing this rule before the effective date. If SBA receives no significant adverse comments, the rule will be effective 90 days after publication without further notice.

List of Subjects

13 CFR Part 124

Administrative practice and procedure, Government procurement, Government property, Small businesses.

13 CFR Part 125

Government contracts, Government procurement, Reporting and recordkeeping requirements, Small businesses, Technical assistance.

13 CFR Part 126

Administrative practice and procedure, Government procurement, Penalties, Reporting and recordkeeping requirements, Small businesses.

13 CFR Part 127

Government contracts, Reporting and recordkeeping requirements, Small businesses.

Accordingly, for the reasons stated in the preamble, SBA amends 13 CFR parts 124, 125, 126, and 127 as follows:

PART 124—8(a) BUSINESS DEVELOPMENT/SMALL DISADVANTAGED BUSINESS STATUS DETERMINATIONS

1. The authority citation for part 124 is revised to read as follows:

Authority: 15 U.S.C. 634(b)(6), 636(j), 637(a), 637(d), 644, 42 U.S.C. 9815; and Pub. L. 99-661, 100 Stat. 3816; Sec. 1207, Pub. L. 100-656, 102 Stat. 3853; Pub. L. 101-37, 103 Stat. 70; Pub. L. 101-574, 104 Stat. 2814; Sec. 8021, Pub. L. 108-87, 117 Stat. 1054; and Sec. 330, Pub. L. 116-260.

2. Amend § 124.502 by revising paragraph (c)(17) to read as follows:

§ 124.502 How does an agency offer a procurement to SBA for award through the 8(a) BD program?

* * * * *

(c) * * *

(17) A statement that the necessary justification and approval under the Federal Acquisition Regulation has occurred where a requirement whose estimated contract value exceeds \$25,000,000, or \$100,000,000 in the case of Department of Defense contracts, is offered to SBA as a sole source requirement on behalf of a specific Participant; and

* * * * *

3. Amend § 124.506 in paragraph (a)(2)(ii) by removing the figure “\$4,000,000” and adding in its place the figure “\$4,500,000” and by revising paragraph (b)(5) to read as follows:

§ 124.506 At what dollar threshold must an 8(a) procurement be competed among eligible Participants?

* * * * *

(b) * * *

(5) An agency may not award an 8(a) sole source contract for an amount exceeding \$25,000,000, or \$100,000,000 for an agency of the Department of Defense, unless the contracting officer justifies the use of a sole source contract in writing and has obtained the necessary approval under the Federal Acquisition Regulation.

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PART 125 – GOVERNMENT CONTRACTING PROGRAMS

4. The authority citation for part 125 is revised to read as follows:

Authority: 15 U.S.C. 632(p), (q), 634(b)(6), 637, 644, 657b, 657(f), and 657r.

§ 125.3 [Amended]

5. Amend § 125.3 in paragraphs (c)(1) introductory text and (c)(1)(x) by removing the figure “\$700,000” and adding in its place the figure “\$750,000”.

6. Amend § 125.12 by revising paragraphs (i)(1)(ii) and (i)(2)(iii) and adding paragraph (i)(2)(iv) to read as follows:

§ 125.12 Who does SBA consider to own an SDVO SBC?

* * * * *

(i) * * *

(1) * * *

(ii) Such veteran had a service-connected disability (as defined in section 101(16) of title 38, United States Code); and

* * * * *

(2) * * *

(iii) In the case of a surviving spouse of a veteran with a service-connected disability rated as 100 percent disabling or who dies as a result of a service-connected disability, is 10 years after the date of the death of the veteran; or

(iv) In the case of a surviving spouse of a veteran with a service-connected disability rated as less than 100 percent disabling who does not die as a result of a service-connected disability, is 3 years after the date of the death of the veteran.

§ 125.23 [Amended]

7. Amend § 125.23 in paragraph (b)(1) by removing the figure “\$6,500,000” and adding in its place the figure “\$7,000,000”.

PART 126—HUBZONE PROGRAM

8. The authority citation for part 126 is revised to read as follows:

Authority: 15 U.S.C. 632(a), 632(j), 632(p), 644 and 657a; Pub. L. 111-240, 124 Stat. 2504.

§ 126.200 [Amended]

9. Amend § 126.200 in paragraph (f) by removing the reference “§§ 126.5” and adding in its place the reference “§§ 125.6”.

§ 126.612 [Amended]

10. Amend § 126.612 in paragraph (b)(2) by removing the figure “4,000,000” and adding in its place the figure “\$4,500,000”.

§ 126.700 [Amended]

11. Amend § 126.700 in paragraph (b)(1) by removing the reference “§ 126.5” and adding in its place the reference “§ 125.6”.

PART 127—WOMEN-OWNED SMALL BUSINESS FEDERAL CONTRACT PROGRAM

12. The authority citation for part 127 continues to read as follows:

Authority: 15 U.S.C. 632, 634(b)(6), 637(m), 644 and 657r.

§ 127.503 [Amended]

13. Amend § 127.503 in paragraphs (c)(2) and (d)(2) by removing the figures “\$6,500,000” and “\$4,000,000” and adding in their place the figures “\$7,000,000” and “\$4,500,000”, respectively.

Isabella Casillas Guzman,
Administrator.

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